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No. 1178

In the

Supreme Court of the United States

OCTOBER TERM, 1966

CATHERINE MUTH, Administratrix of the Estate of CLEM MUTH, Deceased; and MOLLIE DARR, Administratrix of the Estate of KURT DARR, Deceased,

Petitioners,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

PETITION FOR REHEARING

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The Scheffer Press, Inc.—ANdover 3-6850

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Petitioners, Catherine Muth, Administratrix of the Estate of Clem Muth, Deceased, and Mollie Darr, Administratrix of the Estate of Kurt Darr, Deceased, petition for rehearing of the order entered herein on May 8, 1967, denying the petition for writ of certiorari.

THE AMICUS CURIAE MOTION AND BRIEF WERE WITHHELD FROM THE CONSIDERATION OF THE COURT BY THE CLERK'S OFFICE AND THUS WERE NOT PRESENTED TO THE COURT PRIOR TO ITS CONSIDERATION AND VOTE UPON THE PETITION.

Although the petition for certiorari advised this Court that the American Trial Lawyers Association considered the matter of such importance as to plan to file a brief *amicus curiae* (Petition, pp. 14, 22a-23a) such brief *amicus curiae* was not distributed to the Court prior to its consideration and vote on the petition for writ of certiorari on Friday, May 5, 1967. (Appendix, *infra,* pp. 3a-5a)

Without benefit of the motion and brief the Court may not have appreciated the national importance of this case. Moreover, it might well have occurred to individual Justices of this Court in measuring the importance of the questions presented that if the American Trial Lawyers Association did not regard the case as important enough to follow through with a promised brief that the matter was indeed not of sufficient importance for this Court to give it any consideration.

The fact is, however, that on Thursday, April 27, 1967, more than one week before the vote on the petition and only one day after all other papers had been distributed to the Court, a motion and brief by the American Trial Lawyers Association, air-mailed from New Orleans on April 25, 1967, were received by the Clerk of the Court. (Appendix, *infra,* pp. 1a, 5a)

But the Clerk neither distributed the printed motion and brief to the Court nor advised the Court of its receipt prior to the vote on Friday, May 5, 1967. (Appendix, *infra,* pp. 3a-5a)

On Tuesday, May 2, 1967, five days after the Clerk's office received the motion and brief *amicus curiae,* an associate of respondents' counsel advised Deputy Clerk Rodak by telephone and letter that there was an objection to the filing of the brief. The associate stated:

> "It is our opinion, in which we understand that you concur, that the brief is untimely, within the contemplation of Rule 42, paragraph 2, of the Rules of the Supreme Court of the United States."
>
> "This letter will, therefore, advise you that we cannot consent to the filing of this brief and will, in due course, present our formal objection thereto; in any event, on or before the 17th of May." (Appendix, *infra,* p. 2a)

The objection was spurious for the reason that Rule 42, paragraph 2, of this Court's rules, is limited to *amicus curiae* briefs on the merits. The failure of the Clerk's office to distribute the motion and brief had the effect of keeping from this Court any knowledge of the fact that the American Trial Lawyers Association was indeed concerned and interested in the importance of this case from a national viewpoint.

Rule 42, paragraph 1, the applicable paragraph, requires that a motion for leave to file when consent is refused may be filed only if submitted a *reasonable* time prior to the consideration of the petition for writ of certiorari. In this case the motion was submitted only one day after all other papers had been distributed to individual justices and eight days before the Court considered and voted on the petition for writ of certiorari. Rule 42, paragraph 1, provides that distribution to the Court of the petition for certiorari and its consideration thereof will not be delayed pending the receipt of such brief or the filing of such motion. This is similar to Rule 24, paragraph 4, relating to Reply Briefs which we understand are on occasion distributed to the Court after the other papers but nevertheless considered by the Court. The rule by implication permits the filing of such motion after the distribution of the petition for certiorari so long as it is

done a reasonable time prior to the Court's consideration of the petition for writ of certiorari which was on May 5, 1967. It further seems to us that a motion filed one day after distribution of the papers and eight days prior to the consideration and vote of the Court is timely.

However, Deputy Clerk Rodak explains that the practice of the Clerk's office is to withhold distribution of an *amicus curiae* motion and brief for twenty days under Rule 35, paragraph 4. The practice, however, does not appear to be uniform because the same *amicus curiae* filed a motion for leave to file in No. 709 and 733, October Term, 1965, on about February 15, 1966, when consent to file was also refused, yet the motion and brief were distributed to the Court immediately which considered and voted on the motion three days later on February 18, 1966, and granted it on February 21, 1966, although denying a petition for rehearing.

The provision in paragraph 3 of Rule 41, that "a party served with such motion may *seasonably* file an *objection* concisely stating the reasons for withholding consent" does not call for a *"brief in opposition."* There is no need to require twenty days to file "an *objection* concisely stating the reasons for withholding consent" as in the case of a "brief in opposition." Moreover, if such "objection" were regarded as a "brief in opposition" governed by Rule 35, paragraph 4, then in a case in which the *amicus curiae* files a motion and brief concurrently with the petition for writ of certiorari the respondent would be obliged to file a brief in opposition to the *amicus curiae* motion ten days before a brief in opposition to the petition was due. An objection contained within the brief in opposition to the petition would not be "seasonable."

As we have shown, because of its prior experience there was no reason in this case for the *amicus curiae* to believe

that its motion and brief would not be distributed immediately to the Court.

We respectfully submit that the interpretation of Rule 41 by the Clerk's office in this case works an injustice. In the absence of knowledge of the motion and brief in the instant case and because of the representations in the petition for certiorari and the reference to a "promised" *amicus curiae* brief in the opposition the individual justices of this Court may have gained the erroneous impression that the American Trial Lawyers Association had re-examined its position and had determined that the matter was not of importance. The Court in any event was deprived of the *amicus curiae's* thoughtful analysis.

The very nature of this case is one in which petitioners assert that they have been deprived of rights because of undue formalism. At the very outset, petitioner Muth brought a Jones Act action wherein she was entitled to a jury trial. However, her husband's employer, Atlass, despite personal knowledge of the conditions for access, through the device of a petition for limitation of liability which did not even allege absence of privity and knowledge, was able to convert the proceeding into an admiralty proceeding where there is no right to a jury trial. Once in admiralty, the petitioners under the former admiralty rules were prevented from taking the deposition of their husbands' employer, Atlass, in order to establish without question his privity and knowledge and consequently the lack of a foundation for the limitation proceeding. *Miner* v. *Atlass*, 363 U.S. 641. By the time that this Court amended the admiralty rules to permit the deposition, Atlass had died. Subsequently after a trial without a jury, the trial judge found in favor of petitioners here but failed to use the formalistic expressions "negligence" and "proxi-

mate cause" in his findings of fact, although requested so to do and implicit in his findings and judgment and expressed in his conclusions. The Court of Appeals was thus enabled to accept respondents' strained interpretation of the findings that the trial judge did not find proximately causative negligence on the part of the employer. When the trial judge, on remand, explained at length his original intention, the Court of Appeals refused to consider its own misinterpretation taking refuge in the law of the case rule as expounded prior to *Messenger* v. *Anderson,* 225 U.S. 436, 444 (1912).

Now this Court has denied a petition for certiorari unaware of the genuine interest of a substantial segment of the admiralty bar in this case because of a formalistic and we suggest erroneous interpretation of this Court's rules by the Office of the Clerk.

We would hope that if this Court does deny the petition for rehearing in this case that, in any event, it will give due consideration to a revision of its rules. If the Clerk's construction of the Rules controls then an *amicus curiae* that files a motion and brief under Rule 42, paragraph 1, should know with clarity that when consent is refused for any reason, even an invalid reason, that the motion and brief must be filed within ten days after the filing of the petition for certiorari in order to be filed within a *reasonable* time before consideration of the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons and for the reasons suggested in the brief of the American Trial Lawyers Association attached to its motion originally submitted April 27, 1967, which this Court did not previously have an opportunity to consider prior to its May 5 vote, we respectfully suggest that the Court reconsider its order denying the petition for certiorari.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay. I further certify that it is restricted to substantial grounds available to petitioner not previously presented and which arose after the filing of the petition for writ of certiorari herein.

.....

G. KENT YOWELL